UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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MARK I. SOKOLOW, et al.,

Plaintiffs,

v. 04 CV 397(GBD)

PALESTINE LIBERATION ORGANIZATION, et al.,

Defendants.

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New York, N.Y.
January 7, 2015
9:40 a.m.

Before:

HON. GEORGE B. DANIELS,

District Judge

APPEARANCES

ARNOLD & PORTER, LLP
Attorneys for Plaintiffs
KENT YALOWITZ
PHILIP HORTON
CARMELA ROMEO

MILLER & CHEVALIER, CHARTERED
Attorneys for Defendants
LAURA FERGUSON
BRIAN HILL
MARK ROCHON
MICHAEL SATIN

(In open court)

THE COURT: The jurors are getting their orientation now. My guess is that it's probably going to be about an hour or so before we are prepared to go down.

Why don't we use that time productively. Let me address some issues that you wanted to raise first and then we'll get back to some of the evidentiary issues.

Logistically, I know you raised some questions about who can come down in the space. Just tell me how many seats you think you'll need. I can probably accommodate a reasonable number of seats down there, but I can't accommodate 25 people.

MR. YALOWITZ: On the plaintiffs' side, your Honor, it's the three of us, Mr. Horton, Ms. Romeo, myself and we have a professional consultant who is going to do Vulcan mind melds with the jury or something, so that's four. That leaves 21 for the defense side.

THE COURT: I'm always curious about whether the money is well spent. The last case was a criminal case. We had a consultant. They lost.

MR. YALOWITZ: Well --

MR. HORTON: They didn't have our consultant, your Honor.

MR. YALOWITZ: Sometimes even with the very finest representation, you still have to dance with who brung you.

THE COURT: We're setting up tables. That's the other

thing. It's going to take a couple of minutes to set up the tables downstairs for the lawyers to sit and I'm trying to get them to set aside some seats on the side for others. We can probably accommodate a half dozen at each table.

MR. YALOWITZ: We'll follow your lead. Certainly, the three of us can sit at the table, and if our professional.

THE COURT: You have can have either table.

MR. YALOWITZ: Wherever you want him to sit, that's fine with us.

THE COURT: Today I'm not going through the process of introducing the lawyers and the parties. It's on the questionnaire. I'm going to wait until we bring in the jurors next week before we start the individual discussions with the potential jurors, that's when I will introduce the parties.

If you want any plaintiffs or representatives to be introduced, have them here next week on Tuesday when we bring in the jurors and that's when I'll make all of the introductions. And whoever you want introduced, have them here Tuesday morning. Give me a list so I can introduce everyone.

MR. YALOWITZ: Okay. We'll do that.

THE COURT: Mr. Rochon.

MR. ROCHON: I thought it was going to be as many as nine for us: The four counsel, two client representatives and there are three members of the consulting team here. However, if you're not going to be introducing parties or people today,

I may excuse the client reps just to not have so many people there frankly.

THE COURT: All right.

MR. ROCHON: And that would then have us at a total of seven.

MR. HILL: Seven.

THE COURT: Would you want all seven at the table?

MR. ROCHON: I doubt that. I don't know the layout of the room. I've never been on jury duty here.

THE COURT: The layout of the room is it doesn't even accommodate this. We're putting tables there. As a matter of fact, the tables had to be moved to bring in the jurors to give them the orientation. So they're going to set up the tables as soon as they finish their orientation. So it's probably going to be two sets of similar tables, probably not that large, but my guess is four or five people could fit at the table, maybe six, depending on which table they're using. Then I've asked them to try to find some seats on the side.

I'll have someone call downstairs and find out the logistics of the numbers. Those numbers I think are manageable.

MR. ROCHON: I think our consultants will sit at the side. And I appreciate your point about the cost of consultants. It's a very, very good point.

THE COURT: You both have consultants. One of you are

going to get your moppy's worth.

MR. ROCHON: By definition, someone is always happy.

I know we have the jurors assigned numbers. Will they be in order down there today?

THE COURT: No. The way it's going to work is, before we get down there, I have instructed them to give the numbers out to the jurors and to give them -- as a matter of fact, they're going to have a slip of paper in their hand that tells them what their number is.

MR. ROCHON: Okay.

THE COURT: As soon as I finish giving them the introductory remarks, the jury personnel are going to start calling the numbers and they're going to say juror number one.

MR. ROCHON: Right.

THE COURT: And that juror is going to get up, wherever that juror is sitting, they're going to come right up and then we're going to hand them the questionnaire and then go back and take a seat.

MR. ROCHON: They'll be coming from different spots.

THE COURT: Right. But they'll be coming right up to the front to get their questionnaire. So that's the process I decided on so you can see who they are and you can make notes, whatever notes you think or your consultants think are relevant to further assessing their eligibility. It's going to take a little bit of a sit-and-wait process.

MR. ROCHON: Sure.

THE COURT: If you figure it takes 30 seconds or 60 seconds for each juror to come up and get their question anywhere, we have 200-plus jurors. So 200 times one minute is 200 minutes.

MR. ROCHON: Right.

THE COURT: I think it's worth doing that process so we can see who the people are. So we'll get a call. Give me a second with my law clerk. We'll verify that.

I'm being told that what we have worked out with them is that we are trying to set up six seats at each table and trying to set up as many as ten seats to the side. It should be plenty given the limited number of people we have here.

I don't know if there is going to be significant press interest in this process, but I'm not going to exclude them given the issues that we have already addressed with them, so I'll put them off to the side or any other interested people, as long as it's reasonable and we know who is in there.

The only thing is that I need to ensure that you need to get your folks out right away. And I need to ensure that everybody who is not a juror leaves after we finish because then the jurors are going to be sitting there filling out the questionnaires for the next hour. Hopefully, we can get through that process at least by lunchtime or sometime after lunch, we'll hopefully have the questionnaires.

I think another issue was raised, and I didn't addressed yesterday, it was about the affirmance of the witnesses. I don't have any problem -- I'll do it any way you want to do it. There are three ways to do it. Jurors either swear, they either affirm or they swear or affirm. So I'll do it either way you want me to do it. I just want to be consistent.

MS. ROMEO: We spoke about this with defense counsel and they don't have any objection to giving the witnesses an option to affirm or swear. It's a matter of religious preference for a lot of the plaintiffs and witnesses, so as long as they're given that opportunity, we're fine with that.

THE COURT: The language is, "Do you solemnly swear or affirm," and we'll leave it at that.

MS. ROMEO: Right.

THE COURT: Then we take out "So help you God."

MS. ROMEO: That would be fine.

THE COURT: That would be the standard process for each juror. And they can just say I do and that will be it.

MS. ROMEO: Thank you.

I wanted to address first -- I want to try to put aside the -- both sides raised some objections based on the timeliness of the disclosure. I want to put that aside very quickly. It's unclear to me given the different representations by each side with regard to the timeliness of

the disclosure exactly what the determinative issue is.

Let me start with the plaintiffs. Mr. Yalowitz, I think your objection based on timeliness went to some expert opinions. I don't know. There may be some other areas, too.

MR. YALOWITZ: I'm sorry I wasn't clear about that, your Honor. My problem is not with the expert witnesses. We had an agreed-on schedule with the experts and we received their reports timely. We interviewed them on deposition. That all went smoothly.

THE COURT: I'm sorry. I have it backwards.

MR. YALOWITZ: My issue was we got the defendants' witness list in January in accordance with the schedule that Judge Ellis set and we said, well, who the heck are these people? A lot of them we've never heard of.

THE COURT: Because let me make sure we're on the same page. You're talking about people like Issa Asrawi, Safia Baya (ph), those people?

MR. YALOWITZ: Right.

THE COURT: Tell me who it is that is a surprise to you and why I should exclude them.

MR. YALOWITZ: Sure. Frankly, they were all a surprise to me.

THE COURT: And "all" meaning how many of the witnesses?

MR. YALOWITZ: There are 12 left. There were 21.

THE COURT: Right, because they withdrew nine of those witnesses.

MR. YALOWITZ: Right.

THE COURT: So you say now there are still 12 left.

MR. YALOWITZ: There are 12 left. Of the 12 be two of them --

THE COURT: -- are being replaced.

MR. YALOWITZ: Two of them were, you know, New Year's Eve replacements. So those people I never heard of. And frankly, those two people seem like propagandists. I don't really get how they have anything relevant to say to the case. They weren't in the case at the time and they weren't in the PA at the time and maybe the defense can explain what they actually think they're going to talk about, that they have from personal knowledge.

THE COURT: I assume they're going to talk about the same thing that they're substituting for this other witness. I didn't think there was a substantive issue.

MR. YALOWITZ: I don't know how you have somebody who comes and talks about the origins of the Palestinian Authority when they weren't there.

THE COURT: Well, that's possible. It's not impossible. I'm not even sure the people they're replacing are there at the beginning.

MR. YALOWITZ: That was a problem that we raised as

well.

THE COURT: That's not the new issue.

MR. YALOWITZ: Right.

THE COURT: The new issue is -- and you're right, they fall into a different category than the other witnesses. They told you they were going to call two witnesses and they gave you the subject matter of their testimony. Now they found out that those two witnesses are not available, so they want to substitute two more witnesses.

My initial view in the abstract is always, well, look, if that was a timely substitution, meaning that fairly soon after they realized that they had to replace those witnesses, they told you who they were going to replace them with, and these new witnesses are not testifying to new information that you didn't anticipate from the old witnesses, I'm not particularly compelled to say that they should be excluded because now they are being substituted at the last moment. That's a different analysis than just people who just come out of the blue and have different testimony.

MR. YALOWITZ: I understand that thought.

THE COURT: I assume you were aware of the other two witnesses that they're substituting for and you were aware of the nature of their testimony.

MR. YALOWITZ: No. That's the problem.

THE COURT: That's not problem, because the issue you

raised is not having notice of the witnesses. You clearly had notice of those other two witnesses.

MR. YALOWITZ: I didn't, your Honor, respectfully. Let me take you through the chronology.

THE COURT: You didn't know Fayyad and Safia (ph) were on the witness list?

MR. YALOWITZ: I knew they were on the witness list in January of 2014.

THE COURT: Right. So you were aware they were going to be called as witnesses?

MR. YALOWITZ: I was aware January 2014. When I found out -- and I know who Salam Fayyad is. I'm not naïve. Well, maybe I am in some ways. But a lot of these witnesses we never heard of.

THE COURT: I know, but I'm trying to take this point by point. Those two witnesses you have heard of, right? You heard of those witnesses in January of 2014. And this is going to be -- unless both of you can convince me in regard to this kind of objection otherwise, my basic attitude about this is, look, if these people were disclosed to you as being witnesses at this trial in a timely manner during discovery, it is not a valid objection now to say to me you have no idea what they're going to talk about.

MR. YALOWITZ: Okay.

THE COURT: I'm not going to accept that. My attitude

for both sides is, if you found out that this person was on the witness list a year ago, then it was your responsibility at that time to figure out what this person was going to testify to. And if you did nothing, sat on your hands, I'm not going to hear an objection now that even though you knew they were on the witness list, they never told you what they were going to testify about.

MR. YALOWITZ: Okay.

THE COURT: I'm not going to accept that argument from either side.

MR. YALOWITZ: Let me give you the facts so that we're both talking from the common set of facts, and then you can figure out what to do, all right?

In January of 2014, I get a list of -- call it whatever it was -- 21, 12 of whom are still in play.

THE COURT: Okay.

MR. YALOWITZ: It's a list of people, some of whom I have heard of, like Salam Fayyad. I know who he is. You can look him up on Wikipedia. And there were others of whom I have absolutely no idea who they are.

THE COURT: You got this list in January of 2014?

MR. YALOWITZ: Correct. So the first thing I did is, I went back through all of the discovery and remember, I came in the case after discovery was closed. So I worked with my colleagues and we went back and we figured out, okay, we have

some information about some of these individuals, for example, Fayyad, we have a deposition from. Other individuals, we have no clue who they are. We can't find them anywhere in discovery. There's no Rule 26(a) disclosure. There's no document I could find about them.

THE COURT: So what did you do about them in January of 2014?

MR. YALOWITZ: I immediately wrote to Mr. Hill and I said, we can't figure out who these people are. We don't have a 26(a) disclosure. We didn't ever have the fair notice that you were going to put them on your witness list, and so we need to know who they are and we need a deposition of these people.

THE COURT: Okay.

MR. YALOWITZ: And Mr. Hill said pound sand. So, we then came to you and we said we need these witnesses either precluded or we need a deposition and we did that in the *in limine* motion, which we filed in May.

THE COURT: When?

MR. YALOWITZ: In May. So as far as me being prejudiced, my prejudice is, I never had them, I never had notice of them while we were in the discovery phase. When we get out of the discovery phase, I get notice of them, I jump on it and I say I need to know who these people are, you are prejudicing me and I need their depositions. If we had done it in May, you know, I could have taken their depositions easily.

THE COURT: Did you get a response in writing?

MR. YALOWITZ: Yes, I did.

THE COURT: What did the response in writing say?

MR. YALOWITZ: I'll look it up and we'll give it to the Court, because I don't have it memorized, but the response in writing said, in words or substance, we have given you everything we think you're entitled to. In words or substance, that was the response.

THE COURT: You believe you received a letter which indicated that they were refusing to give you any information with regard to these witnesses who were disclosed after the close of discovery?

MR. YALOWITZ: I have a clear and specific memory of the letter and I have a state-of-mind recollection about it.

THE COURT: If you can tell me what that language is --

MR. YALOWITZ: We will get it to the Court this afternoon.

THE COURT: Mr. Rochon, is there some reason why they're in a position -- if they requested information about these witnesses in January of 2014 and indicated that they might want to take their deposition, is there some reason why it did not happen?

MR. ROCHON: I'm not sure if they indicated a desire to take the deposition. Mr. Hill will address this issue. I

appreciate the Court reaching out to me, but I'll defer to him.

THE COURT: Mr. Hill, did you refuse to give them any further information with regard to these witnesses?

MR. HILL: What we said was that we didn't think we violated Rule 37. We don't think we did.

THE COURT: Had you disclosed these witnesses during discovery?

MR. HILL: With the exception of one at the time, yes.

THE COURT: You disclosed them in what manner?

MR. HILL: We produced their depositions. We identified them in response to interrogatories. And we produced documents that had their names on them indicating that they were involved.

THE COURT: Did you indicate at any point in time during discovery that you anticipated that these people were potential witnesses?

MR. HILL: By producing them under Rule 26(e) and the information about them, I believe we complied with that obligation; yes, your Honor. We did not send a 26(a) disclosure saying that they are now witnesses. We otherwise disclosed them in discovery pursuant to 26(e).

THE COURT: Is there a reason why they weren't disclosed in that manner until January of 2014 after the close of discovery?

MR. HILL: Well, they were disclosed during discovery

and then when we prepared the joint pretrial order and listed the witnesses, we then listed their names.

THE COURT: What information did you disclose other than their names?

MR. HILL: For some of them, we produced depositions that had been taken in other cases. For some of them, we responded to specific interrogatories about their knowledge. And for some of them, we produced documents that have their names on them indicating they were involved in preparing the documents.

THE COURT: Is there anyone on that list that we're talking about now that was disclosed in January of 2014 that you did not produce any information about or any relevant documents or testimony?

MR. HILL: Prior to the close of discovery?

THE COURT: Prior to -- putting their name on the list in 2014?

MR. HILL: There's one individual, General Al-Yaman. He was disclosed only because the documents that he pertains to were produced after the close of discovery. Those were the so-called GIS files. As you remember, we initially withheld those on a claim of privilege and we have subsequently produced them, but that production occurred after the close of discovery. The plaintiffs were aware of him because they mentioned him in a letter in October of 2013.

THE COURT: What is the subject matter of his testimony?

MR. HILL: He'll testify about those files, including facts in the files about the escape of Hashaika and Shawish.

THE COURT: Is there any way the other side knows what the substance of his testimony will be?

MR. HILL: We put in the letter that we sent to your Honor on the 23rd.

THE COURT: On the 23rd of?

MR. HILL: December.

THE COURT: If you can group the other witnesses at issue, what is the nature of their testimony?

MR. HILL: Sure. I can go through them. This is Mr. Rochon's letter dated on the 23rd. Salam Fayyad has now been substituted by the information. There, it's about the background of the PA and the PA security forces at the time.

THE COURT: The substituted witnesses are Fayyad and the other one who has been substituted, is that essentially the same testimony that you were going to present with regard to those witnesses?

MR. HILL: Yes, and I think in addition, Mr. Issa, who is the substitute for Dr. Fayyad, would also testify generally about social payment policies. He's the current minister of social affairs. But that's the subject matter that was covered by other witnesses, including Jawad Amawi and Radwan El Hilo

and the three witnesses from the Martyrs' Institute.

THE COURT: Are the plaintiffs in a position to know the substance of the testimony of all of these witnesses at this point?

MR. HILL: I believe so. We disclosed numerous depositions taken in other cases about these general policy issues. We disclosed a declaration from one of the people associated with the Martyrs' Institute who has general information about the Martyrs' Institute, the way it functions, the way they go about preparing the documents that the plaintiffs want to offer into evidence in this case. We disclosed the GIS files that contain the information about the escape of Shawish and Hashaika. We have disclosed the substance of Governor Al-Bakri's testimony about the escape of Abdullah Barghouti.

MR. YALOWITZ: I'm sorry. That one is not true, your Honor. That's really not true.

THE COURT: Mr. Yalowitz, you can't do it that way for two reasons: One, I can't follow it; and two, my court reporter -- the record gets confused.

MR. YALOWITZ: Sorry. I apologize.

THE COURT: I've never refused to hear from you.

MR. YALOWITZ: I know. I know. It's just so many misrepresentations that it's really hard.

THE COURT: Relax, and you can tell me that after he

has fully given me.

MR. YALOWITZ: I wish we would have counsel that would stick to the actual record --

THE COURT: Mr. Yalowitz, I wish that too, and I wish you would stop saying that because it wastes my time.

MR. YALOWITZ: I understand.

THE COURT: Let me try to resolve it.

MR. HILL: Yes.

THE COURT: So is it your position that all of these witnesses were named and only the one general is the only person that you did not provide some sort of documentation to accompany the disclosure of that person with relevant information?

MR. HILL: Just to be precise: Everyone except General Al-Yaman was disclosed in Rule 26(e) disclosures during fact discovery with the exception of the two that we're trying to substitute as you know obviously. So General Al-Yaman was disclosed when we made the productions of the GIS files pursuant to the Court's order of 2013 and the plaintiffs were aware of him no later than October 2013.

THE COURT: Mr. Yalowitz, did you want to add something?

MR. YALOWITZ: Yes, I do. I think what Mr. Hill has done is incredibly deceptive, your Honor. I'm shaking with rage. I'll give you an example. I'll give you two examples

that spring to mind: The first one is these three martyrs foundation ladies, I guess it's two ladies and a man from their martyrs foundation. And they said in response to my *in limine* motion, oh, these people were disclosed, just like Mr. Hill stood here and said that to you. And we went back to try to find how they were disclosed. It turns out, their handwritten signatures were on documents in Arabic in, like, fact documents. That's their disclosure. And now they want to bring these people to say this is how our martyrs foundation works and why we make payments and stuff like that.

That's not a disclosure that puts me on notice that there's going to be a witness at trial who I might want to take the deposition of to find out what they're actually going to say so I can reasonably prepare for trial. That's number one.

Number two, and this one is really, really outrageous to me is Mr. Hill says -- and I really do apologize for interrupting and I take the admonishment seriously -- but to say that the defendants' disclosed that Abdullah Barghouti escaped, that that's their story, is an outrageous misrepresentation. I have never seen -- and I know this record pretty well, maybe I'll stand corrected -- but I have never seen a document or a transcript or a letter or anything in which anybody from the defense side said our defense, our theory of the case is that Abdullah Barghouti escaped so we're not responsible for his activities.

In fact, there was an exchange of correspondence and a meeting with Judge Ellis about Abdullah Barghouti in which the plaintiffs' side represented that our theory of the facts based on the documents is that Abdullah Barghouti was released from prison, and those documents include Abdullah Barghouti's own statements as well as statements of Ahmed Barghouti who released him and so the idea that this guy who is the governor of -- I don't know where he's even the governor of -- I don't have it here, but he's not a prison warden. He's a governor. He's a politician. How does he know that Abdullah Barghouti was escaped. Was he guarding him?

THE COURT: How are you going to prove that he was released?

MR. YALOWITZ: From his statements.

THE COURT: Whose statements?

MR. YALOWITZ: Abdullah Barghouti saying I was released, and from the statements of Ahmed Barghouti who was convicted of providing material support for Abdullah Barghouti because he said I took Abdullah from the prison to the safe house, that's in his own inculpatory statements and in the conviction to which he pled guilty.

THE COURT: I'm not sure how the second goes to the issue of whether he escaped.

MR. YALOWITZ: Well, maybe he didn't -- fair enough. The statement I think goes further than that and says, you

know, we got him from Jibril Rajoub and Rajoub turned him over to us. Things like that. It's pretty well documented that Rajoub released -- and then the other thing is, there's that deposition testimony about his arrest where there was a witness to the arrest who said there was a side deal between Marwan Barghouti and Jibril Rajoub to arrest him and then be released.

THE COURT: Yousef.

MR. YALOWITZ: Mosab Yousef, right. So we have a series of pieces of evidence saying that he was released or making it more likely that he was released than that he escaped, but I never heard of a theory of the case that he was escaped from the defendants until they wrote this letter to your Honor at your Honor's request saying tell me what these people are going to testify to.

THE COURT: Who is the witness?

MR. YALOWITZ: Al-Bakri, Jibreen Al-Bakri.

THE COURT: Mr. Hill, did you ever disclose that this witness had information with regard to an escape?

MR. HILL: Yes, your Honor. I was given an interrogatory that asked me to identify individuals who had information about the arrest or interrogation of Abdullah Barghouti and identified Governor Al-Bakri. That was in March.

THE COURT: Did you say anything about the escape?

MR. HILL: No. It wasn't called for by the interrogatory answer. This was a question about witnesses with

knowledge of the arrest and interrogation. I disclosed him.

THE COURT: Did you ever disclose that you had a witness who was going to come in and testify that he had escaped?

MR. HILL: No. I disclosed the witness and the plaintiffs' chose not to depose him and they chose not to discover that information.

THE COURT: Is there reason why you didn't disclose that information?

MR. HILL: I wasn't asked that question. I was never asked in an interrogatory do you have a witness who knows about an escape. They didn't ask that.

THE COURT: Were you asked about witnesses and the subject matter of their testimony?

MR. HILL: No. I never got an interrogatory like that.

THE COURT: Did you represent anything about Mr. Al-Bakri's -- the subject matter of his testimony?

MR. HILL: I represented that he was responsive to the interrogatory that asked about the arrest and interrogation of Abdullah Barghouti, and they chose not to take his deposition.

THE COURT: They say that you did not make a clear disclosure of any of these witnesses. They say that the disclosure you made was producing a document that had some signature of a person in Arabic.

Did you ever affirmatively disclose this person as a potential witness or as someone who would have relevant information? Did you ever make that representation?

MR. HILL: We certainly did it in January of 2014 as part of the witness list; and then in addition, we filed a declaration in this case and in another case from Mr. al-Deek that explains in some detail his knowledge of the general operation of a Martyrs' Institute. And these witnesses are, to a certain degree, in the nature of rebuttal.

As you know, we have objected to the admissibility of these documents. If the plaintiffs are going to be allowed to offer them, it would severely prejudice our clients if the people involved in their preparation are not allowed to testify and explain what the documents mean and the basis of their knowledge, the general operation of the fund.

As you know, the plaintiffs' theory is this is a reward for terrorism. We would need to be able to call a witness that explains that it's not.

THE COURT: Was Al-Bakri on the list in January?

MR. HILL: Yes.

THE COURT: Of 2014?

MR. HILL: He was. And with respect to government Al-Bakri, I suggest we set him aside until after you have ruled on the renewed motion for summary judgment because he will only testify about the Hebrew University incident. We believe

you're going to grant summary judgment on that because I know Mr. Yalowitz has talked about evidence of a release today. That is all hearsay, and your Honor has already excluded most of that. We have before you a letter about this double-hearsay statement of Mr. Yousef at his deposition. And we think when you look at the evidence that they actually have, you're going to end up granting summary judgment on that matter anyway, in which case, Governor Al-Bakri will not need to testify.

THE COURT: I want to deal with both sides' motion together. What's the nature of your compliant that you did not get full disclosure?

MR. HILL: The majority of the thousands of exhibits on the exhibit list were not produced during fact discovery.

THE COURT: They were produced when?

MR. HILL: After the close of fact discovery?

THE COURT: When?

MR. HILL: On a rolling bases some as recently as last week.

THE COURT: Beginning when?

MR. HILL: Beginning shortly after fact discovery closed and the basic of that principal was the magistrate judge's direction. The magistrate told us not to do that.

THE COURT: I'm not sure what's at issue because that's not the nature of your motion. I thought your motion was directed at expert testimony.

MR. HILL: Which motion are you referring to?

THE COURT: Your motion to exclude expert testimony as not being timely disclosed.

MR. HILL: Yes. That's with respect to the so-called reports.

THE COURT: I didn't know that there was another outstanding motion to exclude all of these documents as untimely disclosed.

MR. HILL: We objected to them individually.

THE COURT: Right. But I don't have a letter application asking me to exclude those documents because they were untimely disclosed. The untimeliness issues that I'm dealing with have to do with what they raised and what you raised with regard to experts.

MR. HILL: If your Honor wouldn't mind, I'd like to show you one of them and talk about it in particular.

THE COURT: I have the January 2 letter.

MR. HILL: Yes. May I approach?

THE COURT: Yes.

MR. HILL: I have handed the Court a copy of Plaintiffs' Trial Exhibit 325. It's very short. You may want to read the English and then I can talk about it. It's only a couple of paragraphs.

THE COURT: Okay. Israeli police memo.

MR. HILL: Yes. It's actually two memos, but they're

put together.

THE COURT: Go ahead.

MR. HILL: The objection here is that this document was first produced to us after the close of fact discovery in March of 2013. It's actually two different memos by apparently two different Israeli police officers, setting aside whether or not it could be authenticated since none these witnesses are on the exhibit list.

What it says is that it examined the crime scene where the Guettas were shot on January 8, 2001. As you can see on the first page carrying over to the second, it talks about how this officer apparently recovered 15 AK-47, 7.65 caliber bullet casings and that he marked them and sent them to investigation. And then on the third page, a different officer talks about recovering 15 more 7.65 bullet casings from a vehicle in an Arab village called Biddu.

So, obviously, the identification of the casings as having that particular caliber or coming from that particular weapon is an expert opinion, and this is a person who I did not have an opportunity to depose. I probably couldn't depose him anyway. He's in Israel. And the plaintiffs want to offer this for the truth of the matter asserted that the bullet casings were, in fact, from that type of gun. This is obviously going to be very prejudicial to me if the jury gets this.

THE COURT: I don't understand that at all. I don't

understand. You say it's obviously very prejudicial to you. I'm not sure I understand at all what difference it could possibly make in this case.

MR. HILL: I don't want to make Mr. Yalowitz' argument. He can correct me if I'm wrong.

THE COURT: I want you to make your argument about prejudice. I don't see the prejudice. Who cares? Why would the jury care?

MR. HILL: They're going to argue their expert Mr. Shrenzel has said that because they were AK-47 casings, that's an indication that PA employees were involved because an AK-47 is a weapon carried by PA security forces.

THE COURT: An AK-47 is a weapon carried by a lot of people.

MR. HILL: Indeed it is, your Honor.

THE COURT: I understand the testimony about whether or not -- because it's an AK-47, that the logical conclusion is that it must have come from the PA.

MR. HILL: Right.

THE COURT: You are saying that there's some reason to believe that an AK-47 wasn't used?

MR. HILL: What I'm saying is I didn't have a chance to test this in discovery.

THE COURT: I understand, and I'm trying to figure out whether or not giving you an opportunity to contest that is

going to put us in any different situation than we're in right now. And you have some reason to believe that this is at issue?

MR. HILL: Yes.

THE COURT: You think it wasn't an AK-47.

MR. HILL: He can correct me if I'm wrong. I understand his argument to be that one of the bases for finding liability against my clients is that the weapon that was used was in fact an AK-47.

THE COURT: Have you done any independent investigation to determine whether or not AK-47s were or were not used?

MR. HILL: I don't know how I could have done so, your Honor. I don't have --

THE COURT: Then if you had this information, how could you have done that?

MR. HILL: How could I have investigated in Israel the police files of the Israel police?

THE COURT: No. You say you are prejudiced because you didn't have this. You have this now.

MR. HILL: Yes.

THE COURT: You had this for two years. Is there some way, simply because you have this, that you could have done something to either determine whether this is true or not true?

MR. HILL: I don't know how I could have.

THE COURT: Then how are you prejudiced? If you couldn't have done anything if you had gotten it five years ago, how are you prejudiced, because you got it three years ago?

MR. HILL: During discovery, I could have.

THE COURT: Done what?

MR. HILL: I could have asked the Court to take a deposition of the author of the report.

THE COURT: You just said it's unlikely you would have gotten a deposition. You wouldn't have even found the author of the report to get a deposition.

MR. HILL: I know his name and I could have asked for a Hague request to depose him.

THE COURT: I'm just saying what you said to me five minutes ago. You said it was unlikely that you would possibly be able to take his deposition. That's what you said to me.

MR. HILL: If I did, I misspoke. I couldn't take his deposition after fact discovery disclosed.

THE COURT: That's not what you said.

MR. HILL: But I misspoke. That's the point I'm making, is that having not gotten it during fact discovery, I could not have used this Court's discovery tools to depose the author of the document to request the Israeli government to provide me access to the casings so my own independent expert could make a determination.

THE COURT: Why couldn't you have done that in 2013 when you received the report?

MR. HILL: Discovery was closed.

THE COURT: Discovery was closed, but your investigation wasn't closed. Why couldn't you have investigated whether or not this information was true?

MR. HILL: I don't know how I would have gone about doing so.

THE COURT: I guess you could have made an inquiry.

MR. HILL: To the government of Israel?

THE COURT: I don't know. I don't know how you say that you would have made --

MR. HILL: I think that would have been an exercise in futility.

THE COURT: So would deposing this witness if this witness has already given a sworn statement that it was an AK-47, it would be an exercise in futility unless you can tell me there's a reasonable basis to believe that the witness was going to break down and say I was lying when I wrote the report that it really wasn't an AK-47.

MR. HILL: No, but what I would test is the qualifications, I would test the testing. The witness just says I collected them and they are AK-47s.

THE COURT: Is there any basis on which you can tell me that you think there is a genuine dispute about the type of

weapon that was used in this case?

MR. HILL: Yes, I do dispute that.

THE COURT: What is the basis of your believing that there's a genuine dispute about the type of weapon that was used in this case?

MR. HILL: No weapon was ever recovered, no one was ever prosecuted, no one ever confused to doing the crime.

THE COURT: How does that raise a dispute as to what kind of weapon was used during the incident?

MR. HILL: There's no admissible evidence as to what kind of weapon was used. Undisputed.

THE COURT: I didn't ask you that. I asked you was there a genuine factual dispute about the type of weapon. One of the two problems that I have, one, I don't hear you saying there's any genuine factual dispute; and two, I don't see where you say that you're prejudiced by the fact that you found out in 2013 that an AK-47 was claimed to be the weapon that was used in this case.

MR. HILL: I assume you don't want me to repeat the arguments I've made.

THE COURT: I don't.

MR. HILL: I told you how I'm prejudiced. I've told you that there's no other evidence of the type of the weapon and that we demand the plaintiffs meet their burden of proof. If they want to prove the kind of weapon, they have to do it

with admissible evidence.

THE COURT: What is the other untimely disclosures that you are asking preclusion?

MR. HILL: Let me get the letter in front of me, your Honor. Again, on the January 1 letter, which is docket entry 703, there's an appendix that indicates which of these Israeli government reports or even state department reports were first produced after the close of discovery, and it would be the same sort of argument.

THE COURT: Does it all have to do with the AK-47 designation or is there some other substantive information that you think will mislead the jury?

MR. HILL: There are other reports as well.

THE COURT: No. What's the substance of the information that you say should not come before the jury? I understand about the AK-47 report. You don't want the jury to conclude from this report that an AK-47 was used. I understand that position.

What is the nature of the information that you don't think should now be put before the jury because you were not aware that that information might be put before this jury?

MR. HILL: For example, your Honor, Plaintiffs' Trial Exhibit 354, which we were discussing yesterday, I don't know if the Court has -- I apologize, I didn't bring a hard copy of this one. We have a binder. This is the one, the statement

from the Israeli Ministry of Foreign Affairs about the so-called Zinni list, and it's obviously hearsay. It says in December 2001, Israel presented US peace envoy Anthony Zinni with the list of 33 most-wanted terrorists requesting their arrest by the Palestinian Authority. The list was subsequently given by Zinni to the Palestinians.

THE COURT: Right. We talked about that yesterday.

MR. HILL: Yes.

THE COURT: What's your timeliness argument? I understand your other argument you made about that, but what is your timeliness argument?

MR. HILL: Again, because it wasn't produced in fact discovery.

THE COURT: When? When was it produced?

MR. HILL: This particular one was produced May 19, 2013, again, after the close of fact discovery.

THE COURT: May 19.

MR. HILL: 2013.

THE COURT: When you got it on May 19, what did you do about it?

MR. HILL: Well, there's nothing I could do about it.

THE COURT: You could have raised it with the Court. Did you do that?

MR. HILL: No, your Honor. I did not seek to reopen discovery.

THE COURT: I didn't ask you whether you sought to reopen discovery. You could have made the same motion you're making now then. There's a lot of things you could have done. I'm not trying to say you should have done anything. I'm just asking, is there anything you did?

MR. HILL: Let me be clear: I didn't think I needed to make a motion.

THE COURT: I didn't ask you that. I didn't ask you that. I asked you a very simple question. You want to make an argument that's not even relevant to my determination.

MR. HILL: Okay.

THE COURT: I asked you, when you got it and you said, ah, discovery is closed, they're producing this untimely, did you do anything at that time?

MR. HILL: I didn't because I didn't need to.

THE COURT: That's fine. You don't have to tell me why. I'm not asking you why. Okay. So, you raised this issue. Now, you're raising this issue. Did you raise this issue with the Court any time prior to January 2 of 2015?

MR. HILL: Yes, I did.

THE COURT: When?

MR. HILL: During fact discovery on about four different occasions --

THE COURT: No. That can't be right. You don't understand my question.

MR. HILL: Okay.

THE COURT: Did you raise the issue of receiving the late disclosure with the Court, either me or Magistrate Judge Ellis, at any time before January 5 of 2015?

MR. HILL: Yes, your Honor.

THE COURT: When, and with whom?

MR. HILL: I did it repeatedly with Judge Ellis during fact discovery.

THE COURT: No. You couldn't have done it during fact discovery because you didn't receive this document until after fact discovery.

MR. HILL: Exactly. And Judge Ellis repeatedly said if you don't produce it during fact discovery, you can't use it at trial.

THE COURT: That's not what I asked you. You are either misunderstanding my question or avoiding my question.

I can only assume what the answer is now by the way you're answering the question.

When you received this document in 2013 --

MR. HILL: Did I go back to the Court?

THE COURT: No. Listen. You did nothing to raise this with the Court about objecting to that --

MR. HILL: -- particular document.

THE COURT: -- that particular receipt of that document until January 2 of 2015; that would be a correct

statement?

MR. HILL: No.

THE COURT: So what did you do after you received the document to raise this with the Court prior to January 2?

MR. HILL: When I filed my objections, I objected on the grounds that it was not produced during fact discovery.

THE COURT: When you filed your objections when? When?

MR. HILL: I believe it was in February of this year.

THE COURT: Okay.

MR. HILL: Last year. February of this year hasn't happened yet.

THE COURT: So February of 2014.

MR. HILL: Yes.

THE COURT: You filed an objection.

MR. HILL: Yes.

THE COURT: So this document.

MR. HILL: Correct.

THE COURT: On the grounds that it was not produced timely.

MR. HILL: Correct.

THE COURT: That's what I'm asking. I'm asking for facts here.

MR. HILL: We had conversations about it here. I have written you a letter about it which is in the record and which

we reference. I don't have the number handy.

THE COURT: You wrote a different letter than the January 2 letter?

MR. HILL: Yes, your Honor.

THE COURT: Okay. Specifically addressing these documents?

MR. HILL: Yes.

THE COURT: And when was that letter?

MR. HILL: Let me see if I can find the docket entry. It was in June of this year.

THE COURT: June.

MR. HILL: June of last year.

THE COURT: What was your request in that letter?

MR. HILL: That all documents produced after the close of fact discovery be excluded based on the Judge Ellis' prior order.

THE COURT: And you referenced this document in that letter?

MR. HILL: Yes. I cross-referenced the exhibit objections which specify which of the documents were not produced prior to the close of expert discovery.

THE COURT: Did Judge Ellis address any of these untimely issues?

MR. HILL: He didn't address them specifically as to these documents because they weren't produced prior to close of

fact discovery. But during fact discovery, he repeatedly ruled that documents not produced during fact discovery would not be allowed at trial.

THE COURT: I understand that, but I'm just trying to understand whether or not Judge Ellis subsequently took some action with regard to any untimely-produced documents to identify these documents as being in violation of his order.

MR. HILL: He ruled prospectively. I did not go back to him and say I now want you to rule. I thought that was with your Honor.

THE COURT: Again, you're taking me there and I'm just right here.

MR. HILL: Okay.

THE COURT: So Judge Ellis did not.

MR. HILL: He has not ruled on the specific documents. He has ruled prospectively generally.

THE COURT: Right. That's all I'm asking. He ruled prospectively. I understand that. You don't have to say that five times. You're trying to answer a different question.

MR. HILL: I have not asked him specifically. I asked you specifically.

THE COURT: Judge Ellis has never been in a position to rule that, oh, yes, I told you not to do this. You have done this. This is in violation of my order. You should expect that you're not going to get that. He never made any of

those kinds of determinations with regards to his order about timeliness.

MR. HILL: He made those determinations before the late productions, but not afterwards; yes.

THE COURT: If you keep doing that, you're going to be less persuasive, not more persuasive.

MR. HILL: -- since discovery closed --

THE COURT: That's all I want to know. This isn't a trick question. I'm trying to get some facts here so I can make an informed judgment. Decisions aren't made by smart people; they're made by informed people. There are just a couple of facts that I'm trying to get from you, and you want to make argument, and I'm asking you facts.

MR. HILL: I have not gone back to Judge Ellis.

THE COURT: So Judge Ellis never addressed it?

MR. HILL: Correct.

THE COURT: Just generally, the nature of the documents, they fall into what category?

MR. HILL: Soup to nuts: IMC materials, websites, publications, newspapers, photographs, videotapes. The majority of the plaintiffs' exhibit list falls into this category.

THE COURT: Let me turn to Mr. Yalowitz.

Mr. Yalowitz, is there any legitimate argument to make that that disclosure was not timely or was excusable if it was

untimely?

MR. YALOWITZ: Sure. So, a couple of things on that. First of all, what we're talking about, with the exception of some family photographs, family photographs that I collected from my clients because I want the jury to see photographs of the deceased, I want the jury to be able to see photographs at opening so that they can know who the plaintiffs are, other than photographs, what we are talking about is material public domain material collected mostly by experts in connection with their expert reports.

THE COURT: That doesn't advance a timeliness argument. Tell me about the time.

MR. YALOWITZ: Bear with me.

THE COURT: Why is it timely? Why is it not timely?

MR. YALOWITZ: It's timely because it's not material that the plaintiffs had. I didn't have position, custody or control of it.

THE COURT: So when do you say you obtained this information and in relationship to when you obtained this information, when did you disclose it?

MR. YALOWITZ: Our practice has been with material that we collected from the public domain, we make prompt supplementations. I can't say every one has been three days, but within a week, within ten days, we get it, we provide it. That's been our practice since the day I came into the case and

I believe a high degree of confidence that that was the practice before I came into the case.

THE COURT: Is there any of this information that you had during discovery?

MR. YALOWITZ: It's a lot of information. I want to go back and check before I make a blanket representation like that, but I can tell you if there was, it would be inconsistent with our practice.

THE COURT: And it would be inconsistent with Judge Ellis' order.

MR. YALOWITZ: That I don't -- well --

THE COURT: If you had it during discovery and you didn't produce it during discovery and you didn't produce it until after discovery closed, that would not be a timely production.

MR. YALOWITZ: I believe that is true. I agree with that, and I would need a good excuse.

THE COURT: Right.

MR. YALOWITZ: I agree with that. And I will tell you that in candor, the family photos obviously fall into that category if they -- I have to say, you know, family photos -- it's not uncommon for family photos to get exchanged as we approach trial. And I don't know. I haven't gone back and looked was there a request for family photos and all like that.

I think the family photos are really important so that

the jury can understand, number one, they can see who the plaintiffs are, who are the survivors, and number two, so they can get a name to the face of the decedents.

I haven't gone back and parsed Judge Ellis' rulings. There's not a written order. It's a bunch of conversations in which Judge Ellis says some stuff, and people say stuff on the transcript all the time. And what the defendants have done, as is their custom, is they have seized from a snippet here and there and turned it into some, you know, grand plan for the conduct of the case, which --

THE COURT: What I'd like you to do is, these documents that are in issue, I want you to indicate to me which one of these documents that you had during the discovery.

MR. YALOWITZ: We'll go back and look at that.

THE COURT: I don't need a full list, but I want to know candidly what you had in discovery.

MR. YALOWITZ: I think you're entitled to that. And I'm representing to you that the family photos -- I'll say some of the family photos are recent. I went to people and said, look, I want to show a picture of you to the jury and we took a photo, so those we didn't have during discovery, but photos of the decedents obviously we had. If the Court wants, I can go back and try to parse through it.

THE COURT: I just want you to know I'm not going to make you do it as to every exhibit but I want you to identify

for me which exhibits you had during discovery.

MR. YALOWITZ: Obviously, I make a blanket representation on family photos because it's impossible to have them other than from the clients who had them from before the victims were killed.

THE COURT: Quite frankly, I give you a little bit more leeway than that. Even if the family members had them, if you had not requested them of the family members and did not receive them yourself after having made the decision that this is something that you might want to produce, I might be somewhat more flexible with whether or not there's a family photo that you asked for after the close of discovery and you gave them in a timely manner. And obviously they may have a technical violation, but there's no prejudice to them that they got a family photo three months after the close of discovery that the lawyer didn't have in his possession during discovery as opposed to getting it before the day it closed on discovery.

MR. YALOWITZ: I'll tell you, your Honor, with the family photos, we weren't sitting on anything. It's the opposite. There are still a couple of families I would like a photo of and I'm working to try to get that.

THE COURT: You don't have to tell me about what the client had. I'm interested to know what the lawyers had in their possession during discovery.

MR. YALOWITZ: I get it.

THE COURT: And if you tell me you had X exhibit in your office and you didn't produce it during discovery, I want to know why and I want to know a good reason for it or otherwise, as they say, that's a foul.

MR. YALOWITZ: I agree with that. I understand that. I think we should be held to that standard. I'm going to go back and check. Obviously, I think what the Court is asking is, did the counsel for plaintiffs have it.

THE COURT: Right.

MR. YALOWITZ: I understand the Court to be asking about all the counsel for the plaintiffs, not just me, because I didn't come into the case until after that. So that's the inquiry I'm going to make. We'll do it on a rolling basis because it's a lot of questions to be asking.

THE COURT: As I say, you can do it on a rolling basis, but we have a week, less than a week, so you better roll it pretty quickly. That's why I said I just want to know what it is that you had during discovery, because that's what I'm going to ask you. If you don't put something on that list, the only thing I can do is take your representation as an officer of the Court that you didn't get this and the lawyers didn't get this or you don't have any evidence that you got this during discovery and that's the reason not to have produced it during discovery. It's not necessarily a good reason to have it admitted during the trial, but it's a reason why it wasn't

produced during discovery.

I will look at that. Just tell me if you want to make some representation in the letter that I'm still expecting to get from you, you can do that.

MR. YALOWITZ: Yes.

THE COURT: I can tell you that for both sides' planning, I am not inclined to grant either one of these motions based on timing, but I'm going to think about it. I'm not inclined to grant your motion and I'm not inclined to grant their motion.

MR. YALOWITZ: The inclination is to let the witnesses testify.

THE COURT: That's my inclination.

MR. YALOWITZ: Okay.

THE COURT: I think it's an issue that you intend to raise. I think that the nature of the response, it would be appropriate if you raised it. Quite frankly, I think they do have a point that even if they hadn't disclosed this, if you presented that evidence that he escaped, it would be appropriate rebuttal to say no, we have evidence that he didn't, that you presented evidence that he was released, it would be sufficient and appropriate rebuttal to say we have evidence that he escaped, and if you put in evidence that he was released, we're going to put in evidence that he escaped.

Quite frankly, if you don't put in evidence that he

was released, then they wouldn't have an independent basis to put in evidence that he escaped and I would grant your motion, because if they had intended for that to be their defense, regardless of what you presented, then they would have a heavier burden in this case.

I think you're in a position to put this before the jury and let them decide whether or not this is appropriate. And you have it enough times -- I don't -- quite frankly, neither one of you have convinced me that had you had this ten weeks ago whether or not we would be in any different situation and sit here and talk about, well, he says this and he says that.

MR. YALOWITZ: I really respect your Honor is working hard to be fair and balanced to both sides, and I do respect that. I know you have thought about it and will continue to think about it. The one thing that is really a problem for me is to have a new, substantive assertion on the eve of trial and a witness who has never been identified as making it really turns it into trial by ambush.

If your Honor is inclined to let these witnesses testify, I have to say I was very diligent in raising a problem. We went back and emailed with our office and that letter that I mentioned was February 14, so it was about two weeks after we got their witness list. I'll be happy to email it to the Court's staff later today. And we'll also send

Mr. Hill's response, which was two weeks later.

And if the Court is really inclined to let these witnesses come and testify, I think a curative remedy that I really would commend to the Court is to let us take an eve-of-trial deposition of these people so that we know what they're going to say, so that we can be efficient in front of the jury, so that we're not subject to serious, unfair surprise.

I think that's within the Court's discretion. I think it would make the trial more efficient. It wouldn't entirely cure the prejudice, but it would at least put me on a footing where I'm not crossing coal.

THE COURT: My position is the same as my position with Mr. Hill. Tell me what it is that you think this person is going to say that is going to be -- and you may have some greater comfort letter because you deposed him -- but what do you think that you're going to get out of a deposition other than to see whether somehow you can poke holes into his representation that he escaped?

You have the information. You know what he's going to say. You have information from a different source that you want me to allow over their objection that he was released.

MR. YALOWITZ: This guy was a public official. His movements may have been documented. There's a lot we could do with a guy --

THE COURT: Between now and Tuesday?

MR. YALOWITZ: No. There's a lot we could have done. There's a lot we could have done between February and today, and now I can't do it.

THE COURT: I know, but you're telling me -- I'm only addressing the issue of you want a deposition between now and Tuesday. I'm trying to say to you that that doesn't seem to help you.

MR. YALOWITZ: I want a deposition.

THE COURT: If you want me to help you with this issue, either I'm going to commit error, reversible or not reversible, by allowing them to do this, or you're going to go forward and you're going to deal with this. I can't see how I'm going to undue the prejudice if you think there's prejudice by giving you a deposition on Monday.

MR. YALOWITZ: I think that, like a lot of things, as a district judge, you have very significant discretion on evidentiary calls obviously. I'm not standing here arguing you're committing reversible error. I'll tell you if I think you are because I don't think you are.

THE COURT: Look, the bottom line is, I think you're in a little more awkward position with this issue because if they had made no disclosure, once you put a witness on the stand who said this guy was released, it would be difficult for you to argue to me that they cannot now bring in a witness to

rebut that, even if that witness had never been disclosed, okay, because you put that issue in the case. They didn't put that issue in. Quite frankly, that issue is not even in the case at this point until you put a witness on the stand to say so.

So you're absolutely right: Part of the control you already have is that if you don't want to make this an issue and you want to keep them from doing this, then don't put the contrary evidence on. If you don't put evidence on that he was released, there's no basis for them to put on evidence that he escaped.

Now, if you want to put that evidence on, it's very difficult for you to argue that they cannot say to you that now, Judge, we want to call a witness who is going to say he was not released, he escaped. And if you had said, well, he never disclosed that and they say, well, Judge, we don't have to disclose that, that was not what we intended to put in on our case to defend our case. That's what they put in to this case, that he escaped. And we have the right, if we have a rebuttal witness, to call that rebuttal witness, even if this rebuttal witness wasn't identified during discovery. And I think they're probably right that you can't interject that into this case and then say that they can't rebut it.

I think you're in a better position than that because you know prior to trial that this is what he's going to say.

Now, whether or not it would have been better if you would have gotten a deposition of him at the time, I mean, that's true. Both of you were making those arguments.

MR. YALOWITZ: Let me be very clear about this. First of all, I want to be very clear that this is a matter of how you exercise the disclosure invested in you.

THE COURT: I understand.

MR. YALOWITZ: Here is where I disagree with you and it's really about Al-Bakri because the escape of Abdullah Barghouti or the release of Abdullah Barghouti is really a pretty core issue in this case. It's not a side issue. It's not a surprise issue. It's a central issue that here is a guy who is a known terrorist. The president of the United States of America demanded his arrest. They arrested him. And three weeks later, they released him and he went on a killing spree. That's the core narrative of my case.

THE COURT: I'm not sure the jury is going to agree with you. The core narrative of your case is what their relationship was with him after he escaped. That's the core analysis. That's what's important.

If he escaped and the inference is or the circumstantial evidence is that they were complicit with him in committing the terrorist act, I couldn't care less whether he climbed out the window or they opened the door if I'm on the jury. I'm concerned about what did he do once he got out

there.

Now, you want to draw the inference. Sure, you want them to say sure, yeah, it was more likely they were involved if he was released than he escaped. Maybe, maybe not. I don't know how many people they released. They released a lot of people and not everybody went out and did terrorist acts, so I'm not sure that that follows, but you can argue what you want.

MR. YALOWITZ: Sure. My point is, whether the jury is more moved by the fact that they took a known bomb-maker and let him out on the street or they helped him after -- suppose the jury believes this guy and say, yeah, he escaped, but they helped him anyway, those are both interesting narratives that the jury might conclude. But my issue is as a lawyer on the defense, certainly they anticipated this was going to be in the case, so what they did was sandbag me. They had a witness. They prepared him. They know what he's going to say. They have an obligation under Rule 26(a)(3) to tell me this is what the guy is going to say, and they didn't do that. And there ought to be some consequence for that. I'm not saying between now and next Tuesday, but I'm saying between now and when he comes to testify, bring him to New York a few days early, somebody from my team can take his deposition. It's done commonly enough. It's not that difficult. I know you're going to think about it.

THE COURT: I'll think about it further, but let me also just move because probably we're going to be leaving in another ten minutes, let me move to a different issue because you should know that I have it in context and I'll move to the Yousef issue.

MR. YALOWITZ: Before we do, I just want to mention one other thing, if I may, which is, with these two substitute witnesses, the defendants agree it's appropriate to have a deposition in advance of their testimony. They have already agreed to that as a condition to the substitution. What I'm saying is "Add this guy."

THE COURT: I understand.

MR. YALOWITZ: I think he's the one I'm most alarmed about because I've never seen a transcript. I've never seen anything about him.

THE COURT: Have there been any documents produced with regard to his testimony at this point?

MR. YALOWITZ: No, sir.

THE COURT: Are there going to be any exhibits that he's going to utilize?

MR. HILL: I don't anticipate using any exhibits. It would be his personal knowledge.

MR. YALOWITZ: We did ask are there any documents relating to any alleged escape by this guy, and the answer that came back was no.

THE COURT: Okay.

MR. YALOWITZ: That's an admission that we'll use, but if they are now going to suddenly discover documents that are being used to refresh or prep the guy, obviously, we need to see those.

THE COURT: I'll think about it further, but I want to give you some guidance, unless I change my mind, as to where I'm going to go so you should prepare for these witnesses.

With regard to Yousef, first of all, I'll put aside the easy part. There was some testimony that you wanted to offer or someone wanted to offer. Plaintiffs wanted to designate some testimony about torture in prison.

MR. YALOWITZ: We withdrew that. No torture on either side. Nobody tortures anybody in the Middle East. It never happens.

THE COURT: So that's not in the case.

I guess I should turn to the defense because I'm not particularly compelled by the circumstances now under which you want to preclude any testimony for two reasons: One, because there was, in fact, a deposition of this individual where you had a full opportunity to examine this witness; and, two, I think that, given your motion to preclude, that the record -- and I have to look further at the excerpts and I still need to do that -- but the record that I have before me or that appears to be before me and I haven't read word-for-word all the

transcript, it does not clearly demonstrate what you say is the basis for precluding the testimony, which is primarily the hearsay objections that you're raising with regard to the testimony.

Quite frankly, based on this record, it's difficult, if not impossible, for me to rule that most of the statements that you're objecting to are hearsay statements. For example, the phone conversation, it's unclear to me by the nature of the examination or the cross-examination whether or not he's saying something that he has personal knowledge of and he overheard the conversation or whether he's saying something that is third-hand hearsay information that was provided to him. And most of the statements fall into that category.

Now your basis for your objection is that it should be excluded because they can't overcome your hearsay objection. Well, you were there. You did the deposition. And I'm not saying you had an obligation to do anything at the deposition, but if the basis for your objection is that I have a clear record to rule that this is hearsay, you did not give me a clear record to rule that this was hearsay. You had a full opportunity to do that.

There's not a single question -- and I go back, I shouldn't say because I haven't read it word-for-word -- but there's not a single question where you asked him or anyone asked him "Was that what you heard or is that what somebody

told you?" Nobody asked him that.

I find very few positions or parts of this deposition where I can clearly say, ah, this is clearly something that he could not have observed, this is clearly something that someone must have told him. I don't have that record.

I think the burden is on you in order to preclude that testimony and object to that testimony on the hearsay ground is to tell me and show me where I have a basis to definitively determine that this is hearsay, particularly, and I might have taken a different view if there hadn't been a deposition in which you participated. If it was someone else and we can't tell, then that's one thing, but to simply say that you deposed this guy, and since I can't tell what portions of this might be hearsay that that's the basis of your objection, I don't find that compelling. I don't find that compelling.

You could have clearly given me the record to clearly knock this out or knock out any portion of this testimony by putting it to the witness and saying "This isn't something you heard; this is something somebody told you;" and you obviously made a tactical or strategic or unthinking decision not to do that. You didn't do that.

So I'm not particularly compelled that there's any particular statement that I can simply say, well, this statement of a witness who was deposed by both sides who says that this is what happened when I was there, that certain parts

of this I should conclude that that must be hearsay and exclude that and other parts of it; that there are no parts of it that I can say that should be read to the jury with regard to these designations. I'll let you respond to that, but that's my initial reaction, and I'll look at the transcript, of course.

MR. SATIN: Thank you, your Honor.

Let me start, then, by going from where the Court is right now, which is believing that it's not our burden to prove the exception and to assume that because we were at the deposition, we had the opportunity to clear it up; those are two arguments. I'm not going to address it now.

Let me start by saying this: What is undisputed is that the testimony that's given by Yousef is based on hearsay in the sense that there's an out-of-court statement. Even if he had firsthand knowledge of that statement, he's relaying that statement.

THE COURT: No. There's not undisputed --

MR. SATIN: For example, this idea that there was a deal between Jibril Rajoub and Marwan Barghouti to release him, that deal, his ability to say there was a deal is based on him overhearing that, that conversation, whether he learned about it from somebody else third-hand or he was actually present when they said that.

THE COURT: I know, but that doesn't make it hearsay, because he is testifying at a deposition as to exactly what he

what he heard, okay? The fact is, a deal is like a contract. It is the operative language that is important, not the facts of what the details are.

So he says that I was there and I heard them talking and they struck a deal while I was there. Now, if I was on this witness stand, and I have to assume that the deposition is comparable to being on this witness stand, if I was on this witness stand and someone said, okay, tell me what occurred when you were in the lawyer's office and I said, well, when I was in the lawyer's office, Mr. Hill and Mr. Yalowitz agreed that they were going to be much nicer to each other, that's what I'd testify. That's what I heard in substance in appropriate language. That's not hearsay. There's no hearsay rule that that violates.

The statements that I made under oath about what I heard, what I heard is the operative language that is the agreement; it is not that, well, Mr. Hill said that yesterday Mr. Yalowitz threw a shoe at him. That would be hearsay. You see? As I say, I've had some evidence lessons, too. That's the way it works. So, no, that is not a good example to give me to say that I was there when they struck a deal, okay, to say that under oath.

MR. SATIN: What distinguishes the Court's example from what happened here is that the person who gave that testimony specifically said I didn't know what they said.

THE COURT: Right.

MR. SATIN: If I could pass this up to the Court. Does the Court have that?

THE COURT: I have it right in front of me. So he doesn't know the substance of all of the details of the deal, but he is saying -- the way I read it, he's saying that, look, when they got back together, the kinds of things that they were talking about, it's clear that they had agreed that they would act in this manner.

Whether he is saying that I know that because when they both got out they said, okay, you know the details of the deal we struck? We're going to follow that and the first thing we're going to do is we're going to make sure that this guy is arrested and we'll worry about whether we're going to release him later. Now, if they said that in front of him and he said that under oath, that's not hearsay. I don't know. You don't give me a clean record to determine definitively what you want me to conclude from the way he's testified here because no one explored this. And that is the burden that I do put on you. You didn't explore this.

You took the chance on this record that it would be sufficient for you to argue that this must be hearsay. Well, I can't make a definitive determination this must be hearsay.

I have a scenario in my mind, which I think is a similar scenario that the jury is going to have, that these two

guys may have walked over into the corner and had some secret meeting, but then when they came back in front of him, they said, okay, we're going to do it the way we said we're going to do it and this is what we're all going to do, and then they went and they did it consistent with that. Obviously something happened before him. It doesn't say they told me they had a deal. It says they did a deal.

Now, if you wanted to kill that testimony, you could have said, well, you know they had a deal because they came back and told you they had a deal, right? You didn't hear the deal.

You could have done that. You could have done that. You didn't have to do that. But now you're in a position where you're saying to me I should exclude this because I have to determine that this was hearsay and, quite frankly, I don't have a clear record to do that.

MR. SATIN: First of all, the plaintiffs were at that deposition, too. They had called that deposition.

THE COURT: Right.

MR. SATIN: They asked those questions. They had every opportunity to lay that foundation for that evidence.

THE COURT: That's true.

MR. SATIN: And they didn't do that. But leaving that aside, the example the Court just gave, let's assume that that took place, that those two people went to the corner, they made

a deal, they came back and said, hey, we made a deal, and let's assume it's Marwan Barghouti saying to Yousef --

THE COURT: No, that's not what I'm assuming. Let's assume they came back and said, okay, now we're going to do it exactly the way we said we were going to do it five minutes ago when we were making this deal. We're going to go in this room and we're going to let them be arrested and then we'll worry about releasing them later. Now, if they said that in front of this witness, you could not argue that that is inadmissible hearsay when he testifies to what they said in front of him about what they were going to do when he testified under oath about what he heard them say.

MR. SATIN: If that testimony, Yousef saying I heard those two people say we made a deal to go and arrest him and then release him, if Yousef is now going to say or has said and will be presented to the jury for the truth that, in fact, they said it to make this deal, that's an out-of-court statement.

THE COURT: No, it's not. Not. Because what's at issue is not the truth of what he is saying.

MR. SATIN: Who is the "he"?

THE COURT: Yousef. That's not what's at issue. He's testifying under oath.

MR. SATIN: Right.

THE COURT: What's at issue is whether or not the facts that are in the other statements that he's saying that he

heard are being offered for the truth of what those two individuals said. And based on this transcript, neither one of those -- those are operative statements. They're not factual statements. They're not reciting to him things that happened in the past that they're making representations about. They're talking about what they are getting ready to do and how they're going to handle this situation. That is not hearsay.

If I said under oath we were in front of the bank and you told me you were waiting in the getaway car and I'll go into the bank, that's not hearsay. Under no theory is that hearsay because that's not a representation of fact.

Now, if I said to you, yeah, and I robbed the bank next door yesterday and that was the nature of the testimony that I was relating by what you said to me, that would be hearsay.

I don't see it. I don't see it. I'll look at the transcript, but I'm not persuaded by this argument. As I said, you're in an awkward position given the fact that there was an army of lawyers there and a decision was made not to pursue this, and now you want me to say that this record clearly demonstrates that this is hearsay which should be excluded. And on this record, I can't give you the benefit of that strategic decision not to make a clean record for me if you were going to make a motion to exclude this based on hearsay. That's my reaction to it at this point.

MR. SATIN: Our argument is in the papers. I'd ask the Court to consider both the burden being on the proponent of the evidence regardless of whether opposing counsel was there. There's no "you didn't cross-examine" hearsay exception. So to the extent it's murky, and I'll concede to the Court it's a bit murky, that should not be on us. It should be on them.

THE COURT: Well, it's on you because it's your motion.

MR. SATIN: But it's on them because they're the ones trying to introduce the evidence. The proponent has the burden.

THE COURT: Right. And they don't claim it's hearsay; you claim it's hearsay.

MR. SATIN: Well, no. They claim it's admissible. And they claim it fits within the hearsay exception. And it's the proponent who has the burden to show it falls within that exception. They haven't done that.

THE COURT: No, this is no hearsay exception. This is either hearsay or not hearsay. This is a witness who testified under oath. This is a totally different situation than the other issues that we have dealt with.

This person is testifying under oath with both lawyers from both sides being there to examine him. You can't compare that to some report that's written or some statement by somebody in interrogation. The lawyers are there. That's your

job, to give me a clean record. Nobody did so. Nobody did so. And now you want me to say that this is hearsay. Well, I can't say that this is hearsay because the record doesn't demonstrate clearly that this is hearsay. And it could have demonstrated clearly this was hearsay. It's very easy for you to get rid of this. All you had to say was "You heard this, right, somebody told you this, you didn't experience this." End of story. We wouldn't be debating this. You didn't do that.

MR. SATIN: But he's testifying or he testified, Yousef, about what he heard.

THE COURT: That's right.

MR. SATIN: What he heard or what he claims he heard was that there was a deal.

THE COURT: Right.

MR. SATIN: Then he talks about the details. That fact is hearsay. It's an out-of-court statement by other people offered for the truth.

THE COURT: Again, you can go back and check your case law. The fact that I heard two people agree to a contract is not hearsay. It is not.

What is hearsay is a recitation of facts by that third party that I'm offering for the truth that the only reason that you should believe that those facts took place is because that third party said at a different time that those facts took place.

MR. SATIN: Even if that were true, and I'm not going to agree with the Court, but even if it were true that hearing two people agree to a contract was not hearsay, that's not what we have here. We have two people making a contract supposedly in private and then coming out and said we made a contract.

THE COURT: No.

MR. SATIN: That testimony of "We made a contract," that's hearsay.

THE COURT: Unfortunately, that's not the way it happens. It's not that we made a contract; it's that we have a contract. That's the difference. That's the difference.

If they came out and said we got a deal -- you know, if you said to me, if you said to me the two of you walked out of this courtroom and then, you walked back in this courtroom and said, Judge, we got a settlement, you could not say to me that I couldn't testify under oath that the two of you came in and said you had a settlement. That's not hearsay.

MR. SATIN: Even assuming that were to be the case, the only thing you could say is they said we had a settlement, not what the details of that settlement are.

THE COURT: Only if the details, as I'm relating it, were given to me by a third party, and you don't have a clean record that says that. That's your problem. If you had a clean record that says that, I wouldn't even have to think twice about this. You don't have a clean record that said

that, and you could have very easily had a clean record that said that, all right?

This is the way you decided to proceed. That's fine and dandy. But under the circumstances here, you don't get the benefit of, well, we were there and even though you can't make a determination as to what was said, which part of this was said in their presence, which part of this was said outside of their presence, well, the reason I can't make that determination is because neither side cleared that up.

I'm not saying it's anybody's burden, I'm just saying I don't have it. And if you wanted me to have it, you should have given it to me, and you had a full opportunity. That's what cross-examination is for. That's why the hearsay rule exists, because at least this person was supposed to testify under oath and be challenged with regard to whether or not those statements are information that they really observed rather than information that's inaccurate or third-hand information. That's what the cross-examination is for.

I'll look at the transcript and I'll see if there's something that clearly I believe is a factual statement made by a third party that the record clearly indicates to me that this person did not have any firsthand knowledge of that, that the only way this person had that fact and is relaying that fact to the jury in his deposition is because a third party told him, and so we have to believe the third party in order to have that

testimony or evidence to have any probative value, and I can't create that for you. So that's my basic view.

MR. YALOWITZ: If you're ready to move away from that, and I have enjoyed listening to it because it brings me back to my days at 116th and Amsterdam.

Before we break, and I know the Court is anxious to talk to the jury, I just wanted to tell you two things, one of which I think will take some work off your plate and one of which I think could put work on your plate. I don't need to discuss either one of them. I just want to make sure I communicate it to you.

The first one is, having reflected on your conversation yesterday, what I would like to do with Itamar Marcus, who is our expert witness that brings the PA's television station statements and their newspaper statements, what I'd like to do with him, I don't want to call him in my case-in-chief. I'm going to wait to see what they put in in their case, and I may call him as a rebuttal witness if I think it's appropriate.

I know you reflected on it already, but rather than write something up, I think I understand where the Court is going with the kind of evidence he brings. I'm not waiving that as a rebuttal, but especially in light of our conversation about the escape, I'm going to just reserve on him and not bring him as part of my case-in-chief.

THE COURT: What the situation will be is that that witness will not testify on your case-in-chief.

MR. YALOWITZ: Correct.

THE COURT: And then before that witness is allowed to testify as a rebuttal witness, you'll raise it with the Court and we'll discuss it, and if we think it's appropriate, we'll allow it in.

MR. YALOWITZ: Exactly. I know you already thought about it and had it in mind.

THE COURT: I want the record to be clear so everybody knows what we can anticipate.

MR. YALOWITZ: Great.

MR. ROCHON: Before Mr. Yalowitz reaches his second point, at some point, I'd like to discuss with the Court and Mr. Yalowitz what would open the door to that kind of testimony to get some clarity. I'm not asking for it now.

THE COURT: I can't help you at this point. I really can't. You guys are still sort of formulating how you're going to present this case.

MR. ROCHON: There's going to come a time -- there are certain things that I know might or might not and I'm going to run them by you because I don't want to open the door, but I don't want to do it now.

THE COURT: Okay.Mr. Yalowitz, you had another issue.

MR. YALOWITZ: The same thing: We received a thing on

the docket called a notice of intent to redact the transcript of the proceedings in open court from December 16. The Court has extremely narrow rules about what's appropriate to redact. Once something is said in open court, it's a public document, it's a public record, it's a public statement. All I can say about this notice and the proposed redaction is there they go again.

THE COURT: When was this filed because I haven't seen it.

MR. YALOWITZ: This morning, your Honor.

THE COURT: I guess that's why I haven't seen it. I've seen most everything.

MR. YALOWITZ: All I'll say about it is, There they go again. We're going to have to look at it. You know my position about public proceedings.

THE COURT: I can articulate what their position is, too, so we can all, going forward, be more sensitive to it. I think they have a concern that in the arguments and exchange of the parties, that in the detail of your arguments, you may be intentionally or unintentionally disclosing information that the parties agree was subject to the confidentiality order.

I just say that for you to be sensitive to that, look, when you say something and give me a fact or you want to give me a recitation of what you say the relevant facts are, consider whether or not this is something that is subject to

the confidentiality order and whether or not the details of the facts that underlie your argument are appropriate at this point in time to put on the record. That's the only thing that I said. That's the only thing that I can guess is the nature of their application, because I'm sure they're not asking to redact some things that they said. I'm sure they're asking to redact some of the things that you said.

MR. YALOWITZ: I'm sure they're not.

Look, first off, I really don't want to get wrapped around the axle on this now, but I categorically reject the idea that these intelligence files were ever subject to an agreement. They were not. They were subject to unilateral designation. They are not confidential in any reasonable way, number one.

Number two, I thought we had a ground rule in this case that when we are presenting evidence to the jury, it is a public forum.

THE COURT: But we're not there yet.

MR. YALOWITZ: We'll be there next week.

THE COURT: We're not there yet.

MR. YALOWITZ: So I guess, in truth, I don't really care about the December 16 transcript, other than my basic fundamental American belief in the First Amendment and the right of public access.

THE COURT: Sure.

MR. YALOWITZ: But I do not want this to be a pattern starting on Tuesday that we have some confidentiality restrictions on us based on the evidence in the case.

THE COURT: Let me put it to you this way: My recollection -- and I may have it wrong -- my recollection is that there was not just a protective order, there was a confidentiality agreement.

Am I correct?

MR. YALOWITZ: That is true.

THE COURT: So my attitude is that I am only enforcing the agreement of the parties, and you are bound by that agreement. So whatever that agreement says is what you are bound by; otherwise, you shouldn't have agreed to it, okay? Those are the first ground rules.

You look at your confidentiality agreement and figure out whether or not what you are saying in open court is consistent or inconsistent with that. That's your guidance. You wrote the agreement. I didn't.

MR. YALOWITZ: I didn't write the agreement. I'm bound by it.

THE COURT: The parties did.

MR. YALOWITZ: I'm bound by it. I'm not running away from it, but I did not write that agreement. I would never have signed that agreement.

THE COURT: That's fine.

MR. YALOWITZ: It's an agreement that is fundamentally inconsistent with law.

THE COURT: Well unfortunately for you, you step in the shoes of the prior attorney.

MR. YALOWITZ: I don't deny that.

THE COURT: So this is yours. You bought this agreement when you stepped in as the lawyer.

MR. YALOWITZ: I agree with you.

THE COURT: So you are bound by it, so you can't think of ways to try to get around it. Just be conscious of that, because I don't want to spend a lot of time on running around trying to go back now for six months trying to figure out what portions of things you guys want me to redact.

MR. YALOWITZ: I don't care what happened in the past, I really don't, but I do not want to have a situation where I'm trying to try the case and I put in a document that says "X" PA employee is serving 15 life sentences and he's good in terms of security and morals, and we have to close the courtroom for that.

THE COURT: No. I don't anticipate that that is going to happen with any exhibit or any testimony, and there has to be a real strong argument, and an argument that goes beyond just the fact that there was a confidentiality agreement and protective order with regard to discovery.

MR. YALOWITZ: Right; that's where I am.

THE COURT: And that is going to compel me to say that an exhibit, unless there's some other grounds to redact an exhibit, the exhibit is somehow precluded or it's redacted because the information is, quote, secret.

MR. YALOWITZ: Right. Then we're on the same page. I'm not trying to relitigate what happened in the past. I really don't care. It's not useful. Whatever. It's not important.

MR. ROCHON: This has been clear for a while. Once the trial starts, if it comes in evidence, we all know -- but we're not at trial yet.

THE COURT: I understand. Let's do this quickly.

MR. YALOWITZ: Thank you.

THE COURT: Are we ready?

MR. YALOWITZ: Thank you, Mr. Rochon, for being clear about that.

THE COURT: Let me ask you this. Give me now, before we go down there, what's your best estimate of approximately how many witnesses you have and how long it will take to present your evidence?

MR. YALOWITZ: I have about 40 witnesses, my best estimate. And I believe that if we can move efficiently, I can be done with my case in mid-February.

THE COURT: You have to give me --

MR. YALOWITZ: That's five weeks if we move

efficiently. If we have objections every seven seconds, it's going to take a long time.

THE COURT: Well, if you keep making those statements, it's going to take even longer.

MR. YALOWITZ: I know.

THE COURT: Let's do this. I want you to focus on -- be a little more specific than that. Focus on how many. What's the rate of production of witnesses? How many do you think? My guess is that the number of witnesses are sure. My guess is you may average at least three to five witnesses a day.

MR. YALOWITZ: Depends on the witness.

THE COURT: Right, depending on the witness.

MR. YALOWITZ: Depends on the witness. I have witnesses who I think are going to take me three days and then they're going to be crossed.

THE COURT: That's fine. There are always unusual -- I'm not sure who is going to last three days, but there are always longer witnesses than others.

MR. YALOWITZ: And I have other witnesses that I expect are going to be 15 minutes.

THE COURT: So you can add up the number of people that you think are going to be 15 minutes and we can do four of those an hour.

MR. YALOWITZ: I have thought about it carefully. I

have sharpened my pencil and I think that I can be done in five weeks. I thought about it carefully.

THE COURT: Mr. Rochon.

MR. ROCHON: We listed 22 and everyone here knows we're not going to call anywhere near that many. You know that. We know that. I think that's always the case. I think our case can wind up being a week. It could go a few days over.

THE COURT: So you're talking about a week or two?

MR. ROCHON: Yes. And then it, of course, depends on which of the experts end up needing to testify. I guess two weeks and I'll beat that, and if they asked for five, that's seven. I'd ask the Court maybe to say something like six to eight.

THE COURT: That's what I'm saying.

MR. YALOWITZ: I was thinking seven to nine.

MR. ROCHON: Even I won't argue -- I leave it up to you.

MR. YALOWITZ: Yes, it's up to him.

MR. ROCHON: More jurors might try to wiggle out. That's the concern.

THE COURT: I will say six to eight if you think there's a possibility that we might do it quicker than that.

MR. ROCHON: I think we can.

THE COURT: Do you think there is a possibility that

it might go quicker than that?

MR. YALOWITZ: Quicker than six weeks? No, not if you're going to let them bring in all of those undisclosed witnesses, your Honor.

THE COURT: Suppose I don't?

MR. YALOWITZ: Then there's a possibility.

THE COURT: You know what I can do? I can cut out a bunch of your witnesses. That will save us a couple of weeks.

MR. ROCHON: Yes, I have my own views of what might shorten the case and we'll talk about it on Monday. But I think as the case currently stands, six to eight weeks is fair, and we hope it's much shorter.

THE COURT: I'm going to give them six to eight weeks. That means I'm going to keep the pressure on you to be efficient about this. You guys are all experienced lawyers. I find in criminal cases, usually it takes a lot less than the parties tell me. In the civil cases, the only reason it might take a lot more than the parties tell me is because we're not doing it efficiently, but you guys know how to do this. Be prepared. The basic rule is, have a witness waiting in the witness room when we have a witness on the stand so there are no gaps. I'm going to move this case along.

If the witnesses are here and you have deposition testimony to read or something else to present, let's use that time efficiently so the jury gets -- I want them to get very

early on some confidence that I'm in control of this case, we're moving along, the lawyers are being efficient, not wasting their time. So let's try to keep it moving efficiently.

I'm going to give them that time frame. I think it's probably reasonable. I would hope we might be done before the end of February, but we still also have some holidays.

MR. YALOWITZ: I have just two logistical issues: The first is, the Court has made rulings about the conviction binder that we submitted, the binder of convictions and about the 177 defendants' records. Are those documents deemed admitted in evidence or do I need to move them in? And if I need to move them in, can we do it on Monday before we start?

THE COURT: I'll hear from the defense. The documents that were produced from the files of the defendants directly to the plaintiffs, it seems to me that that demonstration of that fact or that fact will probably be a sufficient foundation for admitting those documents.

My inclination is, to save time, that the documents that were produced, you can just simply offer them and we already have the record for the objections and you can make them again if you want, but the record will stand with regard to the objections, and I'll go ahead and allow them in.

Unless the defense believes that for some reason that you want to put them to the burden in front of the jury to lay

that kind of foundation, but what I'm talking about is having to have the plaintiff literally lay out a litany demonstrating that, look, you gave us those documents, you have no basis for objecting to those documents and we're going to show that we requested those documents, they came out of your files. You can jump up every five minutes if you want and try to keep this from the jury hearing it and seeing it, but I will consider that if you want to go through that process.

MR. HILL: No. We don't intend to do that. The issue I wanted to raise, though, is, as you remember, we had this exchange where we told you what we wanted out and they told you what they wanted in and you ruled on that.

There's a third category of stuff that neither party put on that chart.

THE COURT: Which is?

MR. HILL: It's stuff that we didn't think was relevant and they didn't think was relevant. And I think that should be redacted under the guidance the Court gave us previously. Particularly with respect to the intelligence files, if it doesn't go to issues the plaintiffs thought was relevant, it ought not to be publicly disclosed.

MR. YALOWITZ: Wait a minute. There's a real problem here with that, which is, we spent enormous time redacting in accordance with the chart. I don't know whether we did what Mr. Hill is suggesting. He never suggested it to me. And I'm

not going to have people go back and re-redact these documents again.

THE COURT: My position is still the same, and I think I was particularly generous with regard to the redactions. I redacted every portion that the defendants said that they did not want in this case that the plaintiffs did not put as part of their -- the part that they said was relevant. And I even redacted some portions where the plaintiffs said they wanted it and I redacted it for the defendants.

So on this issue, no, I think in fairness, the jury shouldn't get a piece of paper with three words on it. They should get the report. I asked you to identify the parts that you said that you had objections to. Even some of those parts that I didn't think where necessarily there was a particularly valid objection, if there was a part that the plaintiffs said that they would say was the relevant part, I told them to redact it. I think that was very generous.

MR. HILL: My only point is, we only did that with respect to stuff that was relevant to this case.

THE COURT: Right.

MR. HILL: There's stuff in there that's not relevant and both sides agree it's not relevant.

THE COURT: Right.

MR. HILL: My position is, since your Honor is going to turn this over to the press, that material should be

redacted as well. There's no reason for material that both sides agree is not relevant to be included in the record in the case.

THE COURT: I can only assume that you identified for me the portions that you did not believe should have gone before the jury.

MR. HILL: No. What we did was identify the portions that were relevant to case that should not go. So, there's this whole category of stuff where the parties have agreed through this process --

MR. YALOWITZ: Not true.

MR. HILL: -- that it's not relevant --

MR. YALOWITZ: Not correct.

MR. HILL: -- because the plaintiffs didn't want to offer it and we didn't list it as something that was relevant that we wanted to exclude. So my point is that there's no point in putting that into the record or into the public domain.

THE COURT: Mr. Yalowitz, unless you want to talk me out of it, because I'm getting ready to rule in your favor --

MR. YALOWITZ: No. I'll be silent.

THE COURT: You want to talk?

I'm not going to do that. With regard to the jury, as I say, with regard to this kind of issue, if it's irrelevant, they can ignore it. And if there is some compelling reason

that that particular information, other than a general, well, we think these are secret files and we don't want any words out of the secret file, the minimal words out of the secret file disclosed, if you did not identify it as something that you did not want to put before this jury in a public manner, then I'm not going to force them to redact it at this point in time simply on relevance.

MR. HILL: The other issue is there were a few exhibits that your Honor did require a foundation for out of the 177, and we will insist on them laying a foundation for those.

THE COURT: Is that anything beyond the documents that they did not receive?

MR. HILL: I think that's the group.

MR. YALOWITZ: Wait a minute. This is three documents.

THE COURT: Right.

MR. YALOWITZ: This is three documents.

THE COURT: And two one you said you weren't going to use.

MR. YALOWITZ: I think, frankly, we're down to one document, which is Exhibit 233.

THE COURT: If they insist on you laying a proper foundation for the admissibility of a document that they did not produce to you, then you're going to have to do it. I

think we went through that. I think you said it.

MR. YALOWITZ: I know we went through that and you said is there a genuine dispute that it's your document; and if there is, I want to hear from you and they have been silent. That's my recollection of the Court's ruling on this.

THE COURT: I'm not sure which document you're talking about because I have to say there's only one document at issue.

MR. YALOWITZ: Right.

THE COURT: My suggestion is that you tell them the one document that you want to use.

MR. YALOWITZ: They know it.

THE COURT: Find out from them whether or not you want to offer that document the same way you offer every other document or you want to independently lay a foundation, because, if necessary, you know, you can attempt to lay the foundation. If it's in, then when they put their witness on the stand, you shove it in front of them. If it's not in, make them admit it or deny it and you can do whatever you want with it, but I don't want to waste a lot of time on this if it's not genuinely at issue.

Discuss it with them. Show it to them. If they say they insist on laying some foundation, then you can tell me whether or not you want to or are incapable of doing so or whether you think we should dispense with it depending on which document you're talking about.

MR. YALOWITZ: Let me tell you why I think we should dispense with it quickly. This is a document that was seized by the Israeli defense force. We have it. We gave it to them.

THE COURT: Right.

MR. YALOWITZ: We said who are the people whose signatures appear on this document.

THE COURT: I remember that.

MR. YALOWITZ: They answered the interrogatory. That signature is a guy who works for us and that's it. They didn't say, oh, the document is a forgery. Okay. I can do all of that in front of the jury. It just seems like a waste of time.

THE COURT: It may be a waste of time, unless they have a genuine strategy that they're better off if you have to do that than if you don't have to do that.

MR. YALOWITZ: Fine.

THE COURT: But the bottom line is, if they insist, I may let you do all of that. I may let you even put in evidence that their interrogatory answers.

MR. YALOWITZ: Fine.

THE COURT: If they say they object to the foundation for the admissibility of the document, if they looked at the document and said these are the signatures of their employees, then that's the evidence that you're going to put in there to lay the foundation. And if you have other evidence or you have some other employee that they put on the witness stand, if you

want to shove that document in front of their face and say this is your document, isn't it? We have been sitting here five weeks arguing this document. You know this is yours, right? And they say, oh, yeah, that's mine. And that's the way it happens.

Talk to each other and see whether it's worth your while to fight about this. If it is, then do so. Otherwise, as they say, you know what happens in a case when you say certain things aren't relevant? In a case, 85 percent of the evidence you give to the jury isn't relevant. There's only about 15 percent that's really in dispute in most cases, and that's the thing that's going to make the difference.

Let's figure out what's really in dispute and figure out how you can really win your case, because fighting over most of this stuff, that will be context for them, but that's not going to be a determinative factor here. You know what the determinative factors are in terms of being able to tie a connection between the perpetrators of these acts and the PA and PLO, and you know that's where the jurors are going to be concentrating.

MR. ROCHON: The question about the jury, it's unrelated to this issue, if this is going to be our first meeting for the jury and they're down there waiting for us --

THE COURT: They're not. Now they're ready.

MR. ROCHON: I was going to say, once they're ready, I

did not want to make them wait.

THE COURT: No, we're not. I was waiting for a signal and I just got it.

MR. ROCHON: Okay. Perfect timing. Should we go to the jury assembly room and assemble?

THE COURT: Yes. There's a CSO at the door.

MR. ROCHON: There's two doors to that jury assembly room.

THE LAW CLERK: Go to the door with the CSO and please wait until they instruct you to go in.

MR. YALOWITZ: Before the court reporter leaves, we're going to hand up to the court a proposed order on cost-sharing which the defendants have seen.

THE COURT: If you agree it to, I'll sign it.

(Adjourned)